

2012

Innocence and Federal Habeas after AEDPA: Time for the Supreme Court to Act

Joseph L. Hoffmann

Indiana University Maurer School of Law, hoffma@indiana.edu

Follow this and additional works at: <http://www.repository.law.indiana.edu/facpub>

 Part of the [Courts Commons](#), [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

Recommended Citation

Hoffmann, Joseph L., "Innocence and Federal Habeas after AEDPA: Time for the Supreme Court to Act" (2012). *Articles by Maurer Faculty*. 2599.

<http://www.repository.law.indiana.edu/facpub/2599>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.

Innocence and Federal Habeas after AEDPA: Time for the Supreme Court to Act



**JOSEPH L.
HOFFMANN**

Harry Pratter
Professor,
Indiana University
Maurer School
of Law

In 1993, Professor Jordan Steiker wrote an important and insightful article entitled “Innocence and Federal Habeas.”¹ In the wake of the U.S. Supreme Court’s decision in *Herrera v. Collins*,² Steiker argued that “bare innocence” claims—defined in *Herrera* as a “truly persuasive”³ demonstration of factual innocence not linked with a constitutional claim of procedural error during a prior stage of the proceedings in state court—should be cognizable in federal habeas.

Steiker’s normative argument relied on two empirical premises. The first was that “the scope of federal habeas since [*Brown v. Allen*]⁴ has uniformly rested on Court-identified equitable principles rather than statutory interpretation.”⁵ Steiker’s observation that habeas is largely “the province of the Court rather than Congress”⁶ was bolstered by the fact that, at the time, the federal habeas statute was “notorious for its lack of guidance regarding some critical procedural issues,”⁷ including res judicata, procedural default, successive petitions, abuse of the writ, and retroactivity. But the same premise also applied to the substantive scope of habeas. In *Stone v. Powell*,⁸ for example, the Court excluded Fourth Amendment claims from federal habeas review without any significant discussion of statutory language or legislative intent. This, according to Steiker, was a prime example of “the federal common-law model of habeas decision-making.”⁹

The second premise was that “the equitable standards crafted by the Court have uniformly converged toward innocence.”¹⁰ Steiker explained that, in an effort to roll back the Warren Court’s federalism-driven expansions of habeas and return habeas to the status of an “exceptional” remedy, the Burger and Rehnquist Courts turned to the theories of Paul Bator and Judge Henry Friendly. Bator would have limited habeas review to cases where the state courts did not provide an opportunity for “full and fair litigation” of a federal claim. While never entirely adopting this theory, the Court imposed numerous procedural limitations on habeas consistent with the Bator theory. At the same time, however, the Court also implemented Friendly’s theory—which posited that habeas should primarily protect against the wrongful conviction of innocent defendants—by creating exceptions to the new procedural barriers for habeas petitioners who could demonstrate a colorable claim of innocence.

Steiker took stock of the combined effect of these two theories, and found in the Court’s modern habeas jurisprudence “a central organizing principle: the availability of habeas relief should turn in large part on the guilt or innocence of the petitioner.”¹¹ This, in turn, led to Steiker’s normative conclusion that the Court should—as a matter of either constitutional or federal common law—allow litigation of “bare innocence” claims in federal habeas.

Much has changed since Steiker’s article was published. The most important change, of course, was AEDPA,¹² through which Congress sought to reassert its control by amending the habeas statute in several key respects. Meanwhile, the Court’s habeas jurisprudence has continued to evolve, mostly in the same direction that Steiker observed back in 1993. The current Roberts Court, for example, has continued to impose new procedural restrictions on habeas—most notably, in *Cullen v. Pinholster*,¹³ a restriction on the evidence that may be considered by a habeas court. But both individual justices and the Court as a whole also remain deeply concerned about the risk of wrongful convictions, a concern clearly reflected in recent habeas cases such as *House v. Bell*¹⁴ and *In re Troy Anthony Davis*.¹⁵

Beyond the Court and Congress, the last twenty years also have witnessed the following significant developments: (1) the “innocence revolution,” prompted in large part by DNA evidence; (2) the growth of the “Innocence Project” and similar innocence-driven initiatives; (3) empirical research on the causes of wrongful convictions; (4) state and federal statutory reforms to prevent and remedy wrongful convictions; and (5) the first comprehensive study of the effects of AEDPA on federal habeas litigation.

In this essay, I will discuss the impact of these various changes on the thesis posed by Professor Steiker. I will conclude that the Steiker thesis—that the Court should authorize “bare innocence” claims in federal habeas—remains as strong as ever, but that the thesis should be implemented today in a manner substantially different from the one originally proposed by Steiker.

I. The Problem of Wrongful Convictions

Since 1993, it has become clear to all that the myth of the infallible American criminal justice system is dead. We know

Federal Sentencing Reporter, Vol. 24, No. 4, pp. 300–307, ISSN 1053-9867 electronic ISSN 1533-8363.
©2012 Vera Institute of Justice. All rights reserved. Please direct requests for permission to photocopy
or reproduce article content through the University of California Press’s Rights and Permissions website,
<http://www.ucpressjournals.com/reprintinfo.asp>. DOI: 10.1525/fsr.2012.24.4.300.

that, despite the best intentions, victims, eyewitnesses, crime labs, police, prosecutors, defense attorneys, judges, and jurors all sometimes make mistakes. This has always been true, of course, but DNA evidence has forced us finally to confront the truth. Since the start of the DNA era in 1989, at least 283 convicted defendants have been conclusively exonerated through DNA evidence;¹⁶ even more have been exonerated through other means, including confessions by the real perpetrator.

Wrongful convictions can occur for a variety of reasons. Recent empirical research on exoneration cases, most notably by Samuel Gross¹⁷ and Brandon Garrett,¹⁸ show that many such cases result from erroneous eyewitness testimony, unreliable “snitch” testimony, ineffective assistance of defense counsel, and prosecutorial *Brady* violations involving the nondisclosure of potentially exculpatory information. Even more recently, attention has become focused on the problem of false confessions; in a surprisingly large fraction of wrongful conviction cases, the innocent defendant was either persuaded or coerced into admitting guilt.¹⁹

The understandably strong desire to prevent wrongful convictions has led numerous jurisdictions to reform their criminal justice systems. Dozens of such reforms—including the mandatory videotaping of some categories of police interrogations, additional scrutiny of “snitch” testimony, and experiments in lineup procedures—have been adopted by state legislatures in recent years.²⁰

But no matter how much we may try to reform our investigative and trial processes, mistakes will still occur. In any system operated by human beings, even perfect procedures cannot completely guarantee perfect outcomes. And whether we like it or not, victims, eyewitnesses, police, prosecutors, defense attorneys, judges, and jurors are all fallible human beings.

Moreover, as has been argued persuasively by Ron Allen and Larry Laudan,²¹ it seems likely that there is a tipping point beyond which we would not want to go in this regard, lest our zeal to reduce the risk of wrongful convictions produce a corresponding or even greater increase in wrongful acquittals, thereby placing many more innocent persons at risk of becoming crime victims. As Allen and Laudan point out, at least with respect to the most serious crimes such as rape or murder, “it is doubtful that people would rather be victims of crime than wrongfully convicted.”²²

All of which means that there will always be the perceived need for some kind of “safety valve” by which wrongful convictions can be overturned. Indeed, if one sets aside for the moment the obviously problematic category of capital cases (for which “finality” really does mean “final”), it may well be that such a post hoc “safety valve” is exactly what most in society desire most of all—so that crimes can continue to be solved, and defendants can continue to be convicted and punished, while always leaving open the possibility (no matter how remote) that a wrongful conviction can be reversed based on “truly persuasive”

new evidence of innocence, and a convicted but innocent defendant set free. In addition, as the late Bill Stuntz once wisely noted,²³ the very existence of such avenues for substantive litigation may have the salutary effect of providing an incentive for criminal justice litigants (prosecutors and defense attorneys) to focus more on litigating about substantive justice and less on procedural justice—which would probably be a good thing.

I do not intend to discuss capital cases further in this essay. As Professor Stuntz and I argued in 1993,²⁴ and as Nancy King and I reiterated in 2009²⁵ and 2011,²⁶ there are myriad reasons why capital habeas and non-capital habeas should be decoupled and allowed to evolve separately. Professor King and I believe that, at least for the foreseeable future, access to federal habeas in capital cases should remain relatively unimpeded in order to permit federal habeas courts to engage fully with state courts on constitutional issues that remain highly unsettled and highly controversial. Much of what I am about to say about innocence claims would apply to capital cases as well as to non-capital cases, but probably not all of it. I therefore choose to leave the discussion of innocence claims in capital habeas cases for another day and another forum.

With respect to non-capital cases, the key question becomes, what is the most effective and efficient means by which wrongful convictions can be remedied after conviction? Here, I think it is crucial to recognize that the problem of post-conviction claims of factual innocence is really a composite of three distinct problems.

The first problem is the problem of screening. If there is any available legal procedure by which a convicted defendant might succeed on a claim of factual innocence, and if—as seems inevitable—the convicted defendant cannot be made to bear any significant costs for invoking such a procedure, then most if not all defendants, whether they are guilty or innocent, will seek to avail themselves of the procedure. They have everything to gain, and virtually nothing to lose. This means that there must be some effective and efficient method for screening, or evaluating, such claims of innocence to separate, at least initially, the possible wheat from the probable chaff.

The second and related problem is the problem of investigation. We already have a workable federal constitutional standard, under *Jackson v. Virginia*,²⁷ for evaluating a claim that the evidence presented at trial was legally insufficient to sustain the conviction. That standard is, for good reasons, extremely difficult to meet. Nor do I wish to propose herein that federal habeas courts should be authorized, beyond the scope of *Jackson*, to review the substantive merits of the petitioner’s conviction based upon the same evidence that was presented at trial.

For present purposes, therefore, we are necessarily talking about an innocence claim based on “truly persuasive” new evidence developed after the conclusion of the trial or guilty plea hearing. For any such claim of innocence that may possibly have merit, it will be necessary to devote additional investigative resources to produce and

analyze the new evidence that will establish the ultimate merits of the claim or lack thereof. Without additional factual investigation, beyond that which occurred for purposes of the original trial or guilty plea, such post-conviction claims of innocence surely will fail.

The third problem is the problem of adjudication. How much and what quality of proof of factual innocence must be proffered, after a conviction, to get back into court and obtain an evidentiary hearing? How much and what quality of proof must be introduced at such a hearing to obtain a reversal of the conviction? And what court (or courts) should be authorized to make such determinations?

II. The Role of Federal Habeas Corpus

For reasons too obvious to need detailed discussion, the first line of defense against wrongful convictions must consist of the state appellate and state post-conviction courts. It is a consequence of our federal system that the state courts necessarily must have the first opportunity to find and correct their own wrongful convictions. This is also eminently practical, because state judicial review of a criminal conviction can occur at a time when the witnesses are most likely to remain available and when other kinds of evidence are least likely to have become stale.

What, then, is the proper role for federal habeas? This is where the aforementioned division of the wrongful conviction problem into three parts may prove helpful. To rephrase: (1) How can we best screen post-conviction claims of innocence? (2) How can we best investigate such claims? (3) And how can we best adjudicate such claims?

At present, federal habeas does not seem to perform any of these functions very well, primarily because the Supreme Court has not yet recognized the constitutional validity of “bare innocence” claims.²⁸ This means that a convicted defendant who wants to pursue an innocence claim in federal habeas court must allege some kind of constitutional criminal procedure violation—either in addition to or in place of the innocence claim—in order to have any chance of obtaining relief. And the habeas court eventually must rule on the basis of the procedural claim, not the innocence claim. The only legally recognized role for the innocence claim is to trigger an exception to some kind of procedural barrier that otherwise would preclude habeas review and relief.²⁹

In theory, federal habeas courts might somehow manage to use a petitioner’s procedural claim as an indirect vehicle for addressing, and remedying, a persuasive claim of factual innocence.³⁰ But the best empirical evidence strongly suggests otherwise. Professor Nancy King’s outstanding research on post-AEDPA habeas litigation, originally published in 2007³¹ and significantly updated elsewhere in this volume,³² establishes two central empirical truths: In non-capital cases, federal habeas courts almost never grant relief.³³ And the tiny handful of cases that do lead to grants of habeas relief appear to be distributed almost randomly, in terms of the grounds for granting such relief.³⁴

The apparent randomness of habeas grants probably should not be surprising. The initial screening of federal habeas petitions usually is conducted by court personnel known as “staff attorneys” or “court clerks,” working under the supervision of, and with subsequent review of their recommendations by, federal magistrates and federal district judges. All are highly qualified, experienced, and competent lawyers. But they have very little with which to work. Most habeas petitions are filed *pro se*, and the federal courts have neither the time nor the resources to conduct their own investigations to determine the potential merits of a habeas petition. Nor can they afford to appoint lawyers to help all petitioners at the initial stages of the habeas litigation. This means that the initial screening decision must, by necessity, be based on the often hard-to-decipher petition itself and the written record of the state proceedings. Justice Jackson once described the problem of finding the “occasional meritorious application” for habeas as akin to the “search [of] a haystack for a needle.”³⁵ In reality, it must be more like searching a haystack for a needle while wearing blinders and mittens. This surely accounts for the relative haphazardness of the rare positive habeas outcomes.

More importantly, these problems with the screening and investigation of claims contained in federal habeas petitions are structural and, at least in practical terms, largely irremediable. Courts are simply not well suited to performing these functions. They generally take their cases as those cases come to them, and they generally rely on the litigants to develop the underlying facts and evidence. At the trial stage of a criminal case, our system of justice relies on defense lawyers to develop the facts and evidence on behalf of the defendant. But convicted defendants are not generally recognized as having a right to counsel to assist them in filing state or federal habeas corpus petitions.³⁶ And there is no realistic possibility that such a general right to counsel in federal habeas will be recognized, either by the Court or by means of state or federal legislation, in the foreseeable future.³⁷ Absent a general right to counsel in federal habeas, federal habeas courts will continue to face endless stacks of *pro se* petitions that cannot be evaluated meaningfully without further investigation. And those courts are simply not equipped to conduct such investigations, which means that they will not be able to evaluate the petitions in a meaningful manner.

Nor should we expect habeas courts to do so. When the government initially alleges a person to have committed a crime, we properly place upon the government the burden of proving that person’s guilt beyond a reasonable doubt.³⁸ We also give the defendant the government-paid assistance of a reasonably competent defense lawyer,³⁹ up through the point when the conviction becomes “final” on appellate review,⁴⁰ and we insist that—unless the defendant waives the right—the government’s proof be put before a jury consisting of at least six average citizens who must agree, in whole or in large part, on the defendant’s

guilt.⁴¹ Once the defendant has been convicted by trial or guilty plea, however, the situation changes. Thereafter, and assuming that the evidence at the trial stage was legally sufficient to establish the defendant's guilt,⁴² the government has met its burden, and it is appropriately incumbent upon the defendant to persuade a reviewing court of his innocence.

III. Alternatives for Screening and Investigating Claims of Wrongful Conviction

Fortunately, in the twenty years since Professor Steiker's article, we have seen dramatic developments in the area of screening and investigation of innocence claims. Today, such claims can be brought to the attention of organizations such as the Center on Wrongful Convictions at Northwestern University, which has succeeded in obtaining relief for 34 innocent persons who were wrongly convicted in Illinois courts.⁴³ The Innocence Project performs similar work on a nationwide basis.⁴⁴ Many law schools have started "innocence clinics," in which law students working under the supervision of clinical faculty members screen and investigate claims of innocence by convicted defendants; other nongovernmental organizations run similar operations as well. In total, at least forty-four states, plus the District of Columbia, now have at least one such organization devoted to the pursuit of post-conviction innocence claims.⁴⁵

Even more promising is the recent creation, in North Carolina, of an Innocence Inquiry Commission.⁴⁶ This is a publicly funded state government agency, independent of the state courts except for administrative purposes, that has been tasked with the responsibility to screen and investigate claims of wrongful conviction. The Innocence Inquiry Commission has the statutory authority to refer meritorious innocence claims to a special three-judge panel; the panel may conduct evidentiary hearings and, in appropriate cases, order the reversal of a conviction and the release of the prisoner. Since August 2006, four such cases have been referred for judicial review.⁴⁷

News media organizations have an important role to play as well. For example, the Chicago Tribune helped to investigate and publicize several cases of men who were wrongly convicted of capital crimes and sent to death row in Illinois. More recently, the Tribune has been a leader in focusing public attention on the previously underappreciated problem of false confessions.⁴⁸

And in light of growing public concern about wrongful convictions, some prosecutors have elected to take it upon themselves to investigate facially plausible innocence claims within their jurisdictions. One notable example is Dallas County, Texas, where the local district attorney, Craig Watkins, has partnered with the Innocence Project of Texas to review previously denied claims of wrongful conviction; between 2007 and early 2011, at least 21 convicted persons were exonerated.⁴⁹

The investigation of post-conviction innocence claims has also been made more feasible in certain situations by

recent legislation, both state and federal, creating a legal right of access to DNA evidence that might help to prove a convicted defendant's innocence. The federal Innocence Protection Act of 2004 was a major catalyst for this trend, recognizing such a right in federal capital cases and creating monetary incentives for the states to follow suit.⁵⁰ All but two of the states now have statutes granting some form of legal right to DNA evidence for convicted defendants.⁵¹ The Supreme Court has not yet held that such access is constitutionally mandated, but the issue remains pending.⁵²

These extra-judicial developments are commendable and should be strongly encouraged. Actors situated outside the judicial system—whether private or public—are structurally better positioned to screen and investigate post-conviction innocence claims than are the courts, if for no other reason than that they do not suffer from the same inherent conflict of interest. Courts have an inherent interest in the affirmation of judgments rendered by courts. State courts want to have their own judgments affirmed; federal courts, out of comity and respect, do not want to upset the judgments of state courts. External, non-judicial actors can be more independent in their initial evaluation and investigation of post-conviction innocence claims. Surely this is why North Carolina structured its Innocence Commission as it did.

IV. The Constitutional Status of "Bare Innocence" Claims

There is, however, one vital role that the courts are well designed to—and, indeed, must—perform. That vital role is to adjudicate the merits of a claim, and, if the claim ultimately is found to be meritorious, to provide an appropriate remedy. Even in North Carolina, a case that is found to be possibly meritorious by the Innocence Commission must be referred back to a court—albeit a special one—for final adjudication.

This is likewise a proper role for federal habeas courts, with respect to post-conviction claims of innocence. Today, however, federal habeas courts often cannot perform even this limited and traditional judicial role adequately. Even if a habeas petitioner somehow manages, by hook or by crook, to get someone—a law school innocence clinic, an innocence project, a volunteer lawyer—to develop an interest in his case and to devote sufficient resources to generate persuasive new evidence of innocence, that will not be good enough to get the case into federal habeas court.

This is a problem that can, and should, be solved, once and for all, by the Supreme Court. As noted above, federal habeas courts should not be held responsible for the screening and investigation of post-conviction claims of innocence. But habeas courts can, and should, provide a clear and unencumbered legal path for the adjudication of such innocence claims, as long as the habeas petitioner—with the help of others—can make an adequate proffer of sufficiently persuasive new evidence in support of the claim.

In our recent book on the future of federal habeas corpus,⁵³ Professor King and I advocate that the Court should finally bite the bullet and recognize the federal constitutional status of a “bare innocence” claim based on new evidence, thus resolving the uncertainty created by the *Herrera* decision. We suggest in the book that the appropriate proof standard for such a constitutional claim would be the one already codified within AEDPA—namely, whether the petitioner “has established by clear and convincing new evidence, not previously discoverable through the exercise of due diligence, that in light of the evidence as a whole, no reasonable factfinder would have found him guilty of the underlying offense.”⁵⁴ If such a constitutional claim were to be recognized, then—even under the more restrictive version of federal habeas that we propose for non-capital cases—the claim could be litigated in federal habeas court.

V. The Impact of AEDPA

What remains is to address the application of AEDPA’s procedural rules to the proposed “bare innocence” constitutional claim. AEDPA imposes a one-year statute of limitations, but the limitations period does not begin to run until the point in time when “the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.”⁵⁵ AEDPA also imposes strict limitations on successive petitions and petitions that raise claims not contained in a prior petition.⁵⁶ But these AEDPA limitations are similarly subject to a statutory exception if “the factual predicate for the claim could not have been discovered previously through the exercise of due diligence” and “the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.”⁵⁷ The proposed “bare innocence” claim, if supported by “truly persuasive” new evidence of innocence, would qualify for these exceptions. The same thing can be said for the Court-created habeas doctrine of procedural default.⁵⁸ Under *Schlup v. Delo*,⁵⁹ “truly persuasive” new evidence of innocence also would provide a basis for avoiding procedural default and reaching the merits of the claim.

All of these results make perfect sense. These habeas limitations, whether created by Congress or by the Court, exist for the purpose of ensuring that federal claims are properly presented in state court, and that defendants do not “sandbag” by withholding their federal claims for presentation at a later date.⁶⁰ In a non-capital case, however, there is simply no plausible reason for an innocent convicted person to try to “sandbag.” Instead, an innocent person already has all of the incentive that might be needed to file his claim of innocence at the earliest possible moment, just so that he can get out of prison as soon as possible.

The one habeas procedural requirement that would, and should, apply with full force to “bare innocence”

claims is the requirement of exhaustion.⁶¹ If a convicted defendant can come up with “truly persuasive” new evidence of innocence, and if there is still an available legal remedy in state court, then the defendant is, and should be, required to present that new evidence to the state court before turning to federal habeas.

What if the state court hears the petitioner’s new evidence of innocence, considers it, and then rejects it as unpersuasive? We must then apply AEDPA’s habeas standard of review to determine whether a federal habeas court may reverse the state court’s decision on the merits of the innocence claim. Under AEDPA, the relevant standard of review is whether the state court adjudication “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”⁶² If the habeas court so finds, then the conviction may be reversed. If not, then the state court’s merits ruling will stand.

But what if the state court simply refuses to hear, or to consider, all or part of the petitioner’s new evidence of innocence? This is a variation on the issue that was recently addressed by the Supreme Court in the important case of *Cullen v. Pinholster*.⁶³ There, the petitioner raised a claim of ineffective assistance of counsel based on an alleged failure to investigate mitigation evidence in a capital case. Some of the mitigation evidence was presented at an evidentiary hearing in state court; later, additional mitigation evidence was introduced at a hearing in federal habeas court. The Supreme Court held that, under AEDPA, a federal habeas court must make a retrospective decision based on the same evidence that was considered by the state court; otherwise, the habeas court’s ruling would not involve a proper evaluation of the “reasonableness” of the state court’s decision.⁶⁴

At first glance, *Pinholster* would seem to pose a serious problem for “bare innocence” claims in cases where the state court refuses to hear or consider some or all of the petitioner’s new evidence of innocence. But a closer reading of the Court’s decision reveals that there is a ready escape hatch for such a situation. Justice Sotomayor’s dissent posed the scenario of a habeas petitioner with a *Brady* claim based on new evidence that was not discoverable until after the petitioner’s original state post-conviction petition was denied, and that the state court would not entertain in a successive petition:

Consider, for example, a petitioner who diligently attempted in state court to develop the factual basis of a claim that prosecutors withheld exculpatory witness statements in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The state court denied relief on the ground that the withheld evidence then known did not rise to the level of materiality required under *Brady*. Before the time for filing a federal habeas petition has expired, however, a state court orders the State to disclose additional documents the petitioner had timely requested under the State’s public records Act. The disclosed documents reveal that the State

withheld other exculpatory witness statements, but state law would not permit the petitioner to present the new evidence in a successive petition.⁶⁵

The majority seemed to agree with Justice Sotomayor that such a case might be distinguishable from *Pinholster*. According to a footnote in Justice Thomas's majority opinion:

10. Though we do not decide where to draw the line between new claims and claims adjudicated on the merits, . . . Justice Sotomayor's hypothetical involving new evidence of withheld exculpatory witness statements . . . may well present a new claim.⁶⁶

Footnote 10 points the way to a solution to the problem described above. If a state court simply refuses to hear or consider a petitioner's new evidence of innocence, this would be the functional equivalent of the *Brady* scenario posed by Justice Sotomayor. Based on the majority's footnote 10, this might—and, I would argue, should—constitute a “new claim” for purposes of federal habeas litigation.⁶⁷ Since the new claim would already be exhausted in state court, by virtue of the state court's refusal to consider the new evidence in support of it, the federal habeas court could proceed directly to the merits of the claim.

Another helpful way to think about the *Pinholster* situation might be to focus on the definition of “new” evidence.⁶⁸ Under the traditional definition, “newness” is defined in terms of the petitioner's due diligence in discovering the evidence and presenting it to the courts.⁶⁹ By contrast, the majority's footnote 10 in *Pinholster*—as well as fundamental fairness—would suggest that “newness” should be defined in terms of not only the petitioner's due diligence but also the state court's willingness at least to hear and consider the evidence. If the state court refuses to hear and consider the evidence, then it should remain “new” evidence for purposes of federal habeas litigation.

VI. Conclusion

In summary, I believe that recent developments—including AEDPA—have done nothing but perhaps bolster Professor Steiker's argument for recognition of a “bare innocence” claim in federal habeas. We know even more today than we did in 1993 about the existence and the causes of wrongful convictions, yet we continue to fail in our societal responsibility to develop a reasonable method for dealing with such troubling situations. Federal habeas courts can, and should, play a role in the solution to this problem, and neither AEDPA nor the Court's modern habeas jurisprudence poses an insurmountable barrier to implementing such a solution. At the same time, federal habeas courts should not be expected to bear the primary responsibility for screening and investigating “bare innocence” claims. Instead, we should rely upon, and encourage the continued development of, private and public individuals and organizations situated outside the judicial system to perform these two

functions, and to bring appropriate cases, based on “truly persuasive” new evidence of innocence, to the judicial system for final adjudication.

I make no claim that the implementation of a “bare innocence” claim in federal habeas proposed herein would remedy all cases of wrongful conviction. There will be deserving prisoners who fail to catch the attention of the innocence projects, innocence clinics, and innocence commissions. There will be deserving prisoners for whom no “truly persuasive” new evidence of innocence can be found. There will be cases in which federal habeas courts reject deserving petitions based on “truly persuasive” new evidence of factual innocence. In all such scenarios, the wrongful convictions will continue to go unremedied. In addition, the geographical distribution of justice for the wrongfully convicted will be unequal. Prisoners in states like North Carolina and Illinois, for example, will have better access to such justice than those imprisoned in the few states like North Dakota and Tennessee that lack similar innocence-focused institutions. One can hope that successful approaches in some states will gradually spread to all. But in a federalist system of government, there are no guarantees that this will happen. These problems are unfortunate, but also probably inevitable. Given the substantial societal investment in obtaining criminal convictions in the first instance, no approach to addressing post-conviction claims of innocence will likely ever be perfect.

Whatever imperfections may exist under the proposed new approach, however, will be less so than under the current system. The current system not only relies heavily on the very same imperfect extra-judicial institutions to screen and investigate many post-conviction innocence claims, but also refuses to recognize “bare innocence” claims in federal habeas at all. The current system also relies upon often-arbitrary procedural barriers to block review of those constitutional criminal procedure claims that are recognized in federal habeas. Finally recognizing the federal constitutional status of “bare innocence” claims based on “truly persuasive” new evidence, and removing those procedural habeas barriers, would allow for the prompt merits litigation of all properly exhausted “bare innocence” claims. This would surely represent a significant step forward on the path to justice for the wrongly convicted.

Notes

- ¹ Jordan Steiker, *Innocence and Federal Habeas*, 41 U.C.L.A. L. REV. 303 (1993).
- ² 506 U.S. 390 (1993).
- ³ *Id.* at 417.
- ⁴ 344 U.S. 443 (1953).
- ⁵ Steiker, *supra* note 1, at 388.
- ⁶ *Id.* at 320.
- ⁷ *Id.* at 388.
- ⁸ 428 U.S. 465 (1976).
- ⁹ Steiker, *supra* note 1, at 365.
- ¹⁰ *Id.* at 321.
- ¹¹ *Id.* at 388.

- ¹² The *Antiterrorism and Effective Death Penalty Act* of 1996, Pub. L. No. 104-132, 110 Stat. 1214.
- ¹³ 131 S. Ct. 1388 (2011).
- ¹⁴ 547 U.S. 518 (2006); see also Joseph L. Hoffmann, House v. Bell and the Death of Innocence, in *DEATH PENALTY STORIES* 449 (John H. Blume & Jordan M. Steiker eds.) (2009).
- ¹⁵ 130 S. Ct. 1 (2009); see also Kathleen Callahan, *In Limbo: In re Davis and the Future of Herrera Innocence Claims in Federal Habeas Proceedings*, 53 ARIZ. L. REV. 629 (2011).
- ¹⁶ See <http://www.innocenceproject.org/>.
- ¹⁷ Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173 (2008); Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005); Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469 (1996).
- ¹⁸ Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629 (2008); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008).
- ¹⁹ Lisa Black & Steve Mills, *What Causes People to Give False Confessions?*, CHI. TRIB., July 11, 2010, available at http://articles.chicagotribune.com/2010-07-11/news/ct-met-forced-confessions-20100711_1_confess-dna-evidence-interrogation.
- ²⁰ See Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585 (2005).
- ²¹ Ronald J. Allen & Larry Laudan, *Why Do We Convict As Many Innocent People as We Do?: Deadly Dilemmas*, 41 TEX. TECH L. REV. 65 (2008).
- ²² *Id.* at 83.
- ²³ William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997).
- ²⁴ Joseph L. Hoffmann & William J. Stuntz, *Habeas after the Revolution*, 1993 SUP. CT. REV. 65 (1994).
- ²⁵ Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791 (2009).
- ²⁶ NANCY J. KING & JOSEPH L. HOFFMANN, *HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT* (2011).
- ²⁷ 443 U.S. 315 (1979).
- ²⁸ In *Herrera v. Collins*, 506 U.S. 390 (1993), the Court assumed without deciding that a “truly persuasive demonstration” of actual innocence by a state prisoner subject to a death sentence would give rise to a federal constitutional claim. Since *Herrera*, the Court has on several occasions made the same assumption, without ever actually recognizing the constitutional claim.
- ²⁹ See, e.g., *Schlup v. Delo*, 513 U.S. 298, 327 (1995) (holding that a habeas petitioner who seeks to use actual innocence as a “gateway” to allow litigation of an otherwise procedurally defaulted claim must show that “a constitutional violation has probably resulted in the conviction of one who is actually innocent”; this means that “a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt”).
- ³⁰ For example, a procedural claim of constitutional ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), might substitute for a substantive claim of innocence.
- ³¹ See NANCY J. KING ET AL., *FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996*, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf>.
- ³² Nancy J. King, *Non-Capital Habeas Cases and Appellate Review: An Empirical Analysis*, 24 FED. SENT’G REP. 308 (2012).
- ³³ After following a sample of more than 2,000 post-AEDPA non-capital habeas corpus cases through the federal district and appellate courts, Professor King found an overall success rate of approximately 0.8 percent.
- ³⁴ King, *supra* note 32.
- ³⁵ *Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring in the result).
- ³⁶ See *Ross v. Moffitt*, 417 U.S. 600 (1974) (no right to counsel with respect to state discretionary appellate proceedings or Supreme Court certiorari review); *Pennsylvania v. Finley*, 481 U.S. 551 (1987) (no right to counsel in state non-capital post-conviction proceedings); *Murray v. Giarratano*, 492 U.S. 1 (1989) (same holding with respect to capital cases).
- ³⁷ Such a statutory right exists, at present, only in capital cases.
- ³⁸ See *In re Winship*, 397 U.S. 358 (1970).
- ³⁹ *Strickland v. Washington*, 466 U.S. 668 (1984); *Gideon v. Wainwright*, 372 U.S. 335 (1963).
- ⁴⁰ The right to counsel on a first appeal as of right derives from a combination of due process and equal protection; see *Douglas v. California*, 372 U.S. 353 (1963).
- ⁴¹ *Duncan v. Louisiana*, 391 U.S. 145 (1968).
- ⁴² See *Jackson v. Virginia*, 443 U.S. 315 (1979).
- ⁴³ <http://www.law.northwestern.edu/cwc/>.
- ⁴⁴ <http://www.innocenceproject.org/>.
- ⁴⁵ See the full list at <http://www.innocenceproject.org/about/Other-Projects.php>.
- ⁴⁶ For more information regarding the Commission, see its website at <http://www.innocencecommission-nc.gov/>.
- ⁴⁷ The statutory procedures for the North Carolina Innocence Inquiry Commission appear here: <http://www.innocencecommission-nc.gov/statute.html>.
- ⁴⁸ <http://articles.chicagotribune.com/keyword/wrongful-convictions>.
- ⁴⁹ Angel Carr, *Dallas County District Attorney Speaks on Innocence Project*, COLLEGIAN ONLINE (Feb. 14, 2011), http://collegian.tccd.edu/index.php?option=com_content&view=article&id=1452:dallas-county-district-attorney-speaks-on-innocence-project&catid=109:issue-17-february-16-2011&Itemid=134; Dallas County District Attorney’s Office, Innocence Project of Texas, http://www.dallasda.com/innocence_project_of_texas.html.
- ⁵⁰ The act was adopted as part of the omnibus Justice for All Act, H.R. 5107, Public Law 108-405 (2004).
- ⁵¹ Innocence Project, Access to Post-Conviction DNA Testing, http://www.innocenceproject.org/Content/Access_To_Post-Conviction_DNA_Testing.php.
- ⁵² See *Skinner v. Switzer*, 131 S. Ct. 1289 (2011); *District Attorney’s Office v. Osborne*, 129 S. Ct. 2308 (2009).
- ⁵³ KING & HOFFMANN, *supra* note 26.
- ⁵⁴ This is one of only two categories of claims we propose to allow in non-capital federal habeas litigation: that “the petitioner is in custody in violation of the Constitution or laws or treaties of the United States, and has established by clear and convincing new evidence, not previously discoverable through the exercise of due diligence, that in light of the evidence as a whole, no reasonable factfinder would have found him guilty of the underlying offense.” See *id.* at 91–92; see also 28 U.S.C. § 2244(b)(2)(B) (2006) (same standard used to determine eligibility to file successive habeas petition); 28 U.S.C. § 2254(e)(2)(A)(ii) & (B) (2006) (same standard used to determine eligibility for evidentiary hearing in federal habeas court where factual basis for claim was not developed previously in state court).
- ⁵⁵ See 28 U.S.C. § 2244(d)(1)(D) (2006); Angela Ellis, “Is Innocence Irrelevant” to AEDPA’s Statute of Limitations? Avoiding a Miscarriage of Justice in Federal Habeas Corpus, 56 VILL. L. REV. 129 (2011).
- ⁵⁶ See 28 U.S.C. § 2244(b) (2006).

⁵⁷ See 28 U.S.C. § 2244(b)(2)(B) (2006).

⁵⁸ See *Wainwright v. Sykes*, 433 U.S. 72 (1977).

⁵⁹ 513 U.S. 298 (1995).

⁶⁰ See, e.g., *Sykes*, 433 U.S. at 89 (expressing concern about “sandbagging” on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off”).

⁶¹ This requirement is now codified at 28 U.S.C. § 2254(b)(1) (2006).

⁶² *Id.* § 2254(d).

⁶³ 131 S. Ct. 1388 (2011).

⁶⁴ *Id.* at 1398.

⁶⁵ *Id.* at 1417–18 (Sotomayor, J., dissenting).

⁶⁶ *Id.* at 1401. At least one federal district court has already faced such a situation. See *Hash v. Johnson*, Civil Case No. 7:10-cv-00161, 2012 U.S. Dist. LEXIS 25483 (Feb. 28, 2012)

(district court granted relief to habeas petitioner based on both ineffective assistance of counsel and prosecutorial failure to disclose material exculpatory evidence; court opined that it was “sensible,” in light of *Pinholster*’s footnote 10, to view petitioner’s new evidence of innocence as falling within an exception to the *Pinholster* rule, but found it unnecessary to rely on such an exception).

⁶⁷ There would seem to be no functional distinction between a state court that refuses to allow the petitioner to present his new evidence at all and a state court that allows the evidence to be presented but refuses to hear or consider it.

⁶⁸ See Jay Nelson, *Facing Up to Wrongful Convictions: Broadly Defining “New” Evidence at the Actual Innocence Gateway*, 59 HASTINGS L.J. 711 (2008).

⁶⁹ See, e.g., 28 U.S.C. § 2244(b)(1)(B)(i) (2006), under which “the factual predicate for the claim could not have been discovered previously through the exercise of due diligence.”